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13
14 **UNITED STATES DISTRICT COURT**
15
16 **DISTRICT OF NEVADA**

17 EDWARD COULSON,

18 Plaintiff,
19 v.

20 SOUTHERN NEVADA MOVERS,

21 Defendant.

22 Case No.: 2:16-cv-01989

23 **MOTION TO DISMISS**

24 **COHEN | JOHNSON | PARKER | EDWARDS**

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1 Defendant SOUTHERN NEVADA MOVERS (“Southern Nevada”), by and through their
2 counsel of record COHEN|JOHNSON|PARKER|EDWARDS, hereby move, pursuant to Fed R.
3 Civ. P. 12, to dismiss Plaintiff EDWARD COULSON’s First, Second, Third, Fourth, Fifth,
4 Sixth, Seventh, Eighth, and Tenth counts in his Complaint. This motion is brought based on the
5 pleadings and papers on file, the attached exhibits, the following Points and Authorities, and any
6 and all argument which may be permitted on a hearing of this matter.

7 Dated this 29th day of August, 2016.

COHEN|JOHNSON|PARKER|EDWARDS

By: /s/ Chris Davis

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POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Edward Coulson’s Complaint, alleging claims for defamation, false light invasion of privacy, malicious prosecution, interference with contract, breach of fiduciary duty, conversion, fraud, emotional distress, and breach of contract, is a paradigmatic example of “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements” which the United States Supreme Court held was insufficient to state a claim in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Plaintiff merely recites the elements of his claims without ever alleging facts supporting those elements. Based on these glaring deficiencies, these claims in Plaintiff’s Complaint should be dismissed with prejudice.

1 **II. ARGUMENT**

2 In *Landers v. Quality Commc'ns, Inc.*, 771 F.3d 638, 641 (9th Cir. 2014), as amended
 3 (Jan. 26, 2015), cert. denied, 135 S. Ct. 1845 (2015), the Ninth Circuit held that to avoid
 4 dismissal, “a complaint must contain sufficient factual content “to state a claim to relief that is
 5 plausible on its face.” *Citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft*
 6 v. *Iqbal*, 556 U.S. 662 (2009). The court ruled that “a complaint that offers labels and
 7 conclusions, a formulaic recitation of the elements of a cause of action, or naked assertions
 8 devoid of further factual enhancement will not suffice.” *Landers*, 771 F.3d at 641. The court
 9 reasoned that a “claim for relief is plausible on its face when the plaintiff pleads factual content
 10 that allows the court to draw the reasonable inference that the defendant is liable for the
 11 misconduct alleged.” *Id.* The court found, however, that when a complaint pleads facts that are
 12 merely consistent with a defendant’s liability, it stops short of . . . plausibility of entitlement to
 13 relief.” *Id.*

14 Plaintiff’s Complaint is devoid of any factual allegations which would support his claims
 15 for relief. On that basis alone, Plaintiff’s claims for defamation, false light invasion of privacy,
 16 malicious prosecution, interference with contract, breach of fiduciary duty, conversion, fraud,
 17 emotional distress, and breach of contract should be dismissed with prejudice.

18 **A. Plaintiff’s Claim of Defamation Has NO Merit.**

19 In *Wynn v. Smith*, 117 Nev. 6, 10, 16 P.3d 424, 427 (2001), the Nevada Supreme Court
 20 held that to “establish a prima facie case of defamation, a plaintiff must prove: (1) a false and
 21 defamatory statement by defendant concerning the plaintiff; (2) an unprivileged publication to a
 22 third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.” In
 23 *Wynn*, the Court held that the defendant “may not be held liable for defamation for a statement
 24 that he did not . . . publish.” *Id.* at 12, 16 P.3d at 428. In *M & R Inv. Co. v. Mandarino*, 103
 25 Nev. 711, 715, 748 P.2d 488, 491 (1987), the Nevada Supreme Court explained that
 26 “[p]ublication is the communication of the defamatory matter to some third person.” The Court
 27 held that defamation was not established when the “record contains no direct or circumstantial
 28 evidence of the communication of the defamatory statement to a third person.” *Id.* at 716, 748

1 P.2d at 491. The Court reasoned that to establish publication, plaintiff must show “that the
 2 defamatory statement was comprehensible to and uttered in the presence and hearing of a third
 3 person.” *Id.*

4 Plaintiff does not allege that Defendant Southern Nevada Movers (“Southern Nevada”)
 5 published any defamatory statement to any third party. Instead, Plaintiff merely alleges that
 6 Southern Nevada “accused the plaintiff of embezzling” by “accusing **him** [of] a crime of moral
 7 turpitude, i.e. embezzlement.” *See* Complaint at 4-5, ¶¶ 12, 20 (emphasis added). As Plaintiff
 8 only alleges that accusations were directed to “him,” Plaintiff has not set forth facts of any
 9 publication to a third party by Southern Nevada.

10 While Plaintiff alleges that the “false allegations of embezzlement” may have adversely
 11 impacted him because he was allegedly “pressured into pleading ‘nolo contendre’ or ‘no contest’
 12 to embezzlement charged brought by the Clark County District Attorney’s Office,” Plaintiff does
 13 not allege that Southern Nevada reported the embezzlement to the D.A.’s office. *See* Complaint
 14 at 4, ¶ 16. Without allegations of publication to a third-party, Plaintiff’s claim of embezzlement
 15 fails and should be dismissed.

16 Even if Plaintiff had alleged that Southern Nevada published the complaint to the D.A.’s
 17 office, such publication would be absolutely privileged. In *Clark County School District v.*
 18 *Virtual Education Software, Inc.*, 125 Nev. 374, 382-84, 213 P.3d 496, 502 (2009) held that an
 19 “absolute privilege” applies to “communications made in the course of judicial proceedings even
 20 if known to be false” when communication is made either a “lawyer” or “nonlawyer” that is
 21 “related” to a judicial proceeding has commenced or is, in good faith, under serious
 22 consideration” The Court reasoned that the “purpose of the absolute privilege is to afford
 23 all persons freedom to access the courts and freedom from liability for defamation where civil or
 24 criminal proceedings are seriously considered.” *Id.* at 383, 213 P.3d at 502. The Court
 25 concluded that “because the scope of the absolute privilege is broad, a court determining whether
 26 the privilege applies should resolve any doubt in favor of a broad application.” *Id.* at 382, 213
 27 P.3d at 502.

28

1 Plaintiff has not alleged that Southern Nevada published any defamatory statement to the
 2 D.A.'s Office for good reason. Plaintiff asserts that he pleaded "no contest" to an embezzlement
 3 charge. He thus conclusively establishes that if Southern Nevada had told the D.A. that Plaintiff
 4 had embezzled funds, that such a statement was related to criminal proceedings that were being
 5 "seriously considered." Plaintiff therefore cannot establish a third-party publication, let alone an
 6 unprivileged third-party communication, necessary to establish a claim of defamation, and this
 7 Court should dismiss Plaintiff's claim of defamation with prejudice. *See Hourani v. Mirtchev*,
 8 796 F.3d 1, 7, 16 (D.C. Cir. 2015) (holding that Plaintiffs' complaint alleging that defendant
 9 "conspired to defame the [plaintiff] by publishing . . . defamatory statements, including that the
 10 [defendants] were members and supporters of [a] terrorist group" did not establish a claim of
 11 defamation because the complaint contains "no allegation that [defendants] communicated with
 12 [a third party]" and "the complaint does not even disclose what was published").

13 **B. Plaintiff's Claim of False Light Invasion of Privacy Has NO Merit.**

14 In *Franchise Tax Board of Cal. v. Hyatt*, 130 Nev. Adv. Op. 71, 335 P.3d 125, 141
 15 (2014), vacated on other grounds by 136 S. Ct. 1277, 194 L. Ed. 2d 431, the Nevada Supreme
 16 Court held that an action for false light invasion of privacy arises when (1) defendant "gives
 17 publicity to a matter concerning another that places the [plaintiff] before the public in a false
 18 light;" (2) "the false light in which the [plaintiff] was placed would be highly offensive to a
 19 reasonable person;" and (3) the defendant "had knowledge of or acted in reckless disregard as to
 20 the falsity of the publicized matter and the false light in which the other would be placed." In
 21 *Kuhn v. Account Control Tech., Inc.*, 865 F. Supp. 1443, 1448 (D. Nev. 1994), this Court held
 22 that "publicity" was not shown to establish invasion of privacy when "dissemination of
 23 information that occurred was limited to the small group" of persons. The Court reasoned that
 24 "publicity" requires "that the matter is made public, by communicating it to the public at large,
 25 or to so many persons that the matter must be regarded as substantially certain to become one of
 26 public knowledge." *Id.*

27 As already set forth, Plaintiff does not allege that Southern Nevada published the
 28 accusation of embezzlement to any third party, let alone to communicate it to the public at large

1 so as to be deemed “publicity.” Again, even if Plaintiff had alleged broad public communication
 2 necessary to establish publicity, the Nevada Supreme Court, in *Bullivant Houser Bailey PC v.*
 3 *Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 128 Nev. 885 (2012), held that “***all***
 4 ***claims***” based on communications covered by “the absolute litigation privilege” are “barred.”

5 Finally, even if Plaintiff had alleged facts showing publicity, Plaintiff has not alleged
 6 facts indicating that Southern Nevada acted in reckless disregard of the truth. In *Rowland v.*
 7 *Lepire*, 99 Nev. 308, 313, 662 P.2d 1332, 1335 (1983) (emphasis added), the Nevada Supreme
 8 Court held that where “a defendant has reasonable grounds for belief in his claim,” he could ***not***
 9 know acted that his statement was false, nor “acted in reckless disregard of its truth or falsity.”
 10 By pleading no contest to the crime of embezzlement, Plaintiff is estopped from challenging the
 11 reasonableness of the facts necessary to establish the crime of embezzlement. *See Daubensmire*
 12 *v. City of Columbus*, 507 F.3d 383, 390 (6th Cir. 2007) (holding plaintiffs “are estopped by their
 13 [no-contest] pleas in state court from now challenging the reasonableness of their arrest,” and
 14 that the underlying facts were sufficient to establish probable cause that plaintiffs committed the
 15 crime); *State v. Rosenthal*, 107 Nev. 772, 776, 819 P.2d 1296, 1300 (1991) (holding a
 16 “conviction may be considered even when based upon a plea of nolo contendere”).

17 It is unsurprising that Plaintiff claims that he pleaded “no contest” to the crime of
 18 embezzlement as he admits that he “withdrew money from defendant’s account,” but
 19 erroneously believed that such withdrawals was proper so long as this money was paid back by
 20 his next payroll check because he had previously made such withdrawals. *See* Complaint at 6, 9,
 21 ¶ 25, 40-41. Nowhere does Plaintiff allege that Southern Nevada agreed to allow such
 22 unilateral withdrawals. Under Plaintiff’s own factual allegations, Southern Nevada had every
 23 reason to believe that Plaintiff was guilty of embezzlement. *See Arajakis v. State*, 108 Nev. 976,
 24 985, 843 P.2d 800, 806 (1992) (holding the “diversion of funds from their intended use was
 25 sufficient to infer the crime of embezzlement”). As Plaintiff has not and cannot show publicity
 26 or that Southern Nevada acted in reckless disregard of the truth, Plaintiff’s False Light Invasion
 27 of Privacy claim has no merit and should be dismissed. *See Lopez v. Country Ins. & Fin. Servs.*,
 28 252 Fed. App’x 142, 146 (9th Cir. 2007) (holding that plaintiff’s false light claim lacked merit

1 when plaintiff “has not shown that the defendants, gave publicity to a matter concerning him that
 2 placed him before the public in a false light, that (a) the false light in which he was placed would
 3 be highly offensive to a reasonable person, and (b) the defendants had knowledge of or acted in
 4 reckless disregard as to the falsity of the publicized matter and the false light in which he would
 5 be placed”).

6 **C. Plaintiff’s Malicious Prosecution Claim Has NO Merit.**

7 In *Lester v. Buchanen*, 112 Nev. 1426, 1428, 929 P.2d 910, 912 (1996), the Nevada
 8 Supreme Court explained that the “elements that must be proved in a malicious prosecution
 9 action are: (1) a lack of probable cause to commence the prior action; (2) malice; (3) favorable
 10 termination of the prior action; and (4) damages.” The Court held that “to recover for malicious
 11 prosecution, plaintiff had to demonstrate that police officers commenced the criminal
 12 prosecution because of direction, request, or pressure” from defendants. *Id.* Plaintiff has not and
 13 cannot allege facts supporting any of these elements.

14 First and foremost, the Clark County District Attorney did not even commence criminal
 15 prosecution. Plaintiff claims that “embezzlement charges” were “brought by the Clark County
 16 District Attorney’s Office.” *See* Complaint at 4, ¶ 16. A search of Clark County District Court
 17 records reveals no criminal prosecution of Plaintiff Edward Coulson. *See* Exhibit 1,
 18 Civil/Criminal Case Records Search Results,
 19 <https://www.clarkcountycourts.us/Anonymous/Search.aspx?ID=400> (August 25, 2016). A
 20 search of the Clark County Justice Court records show charges for battery, but no charges for
 21 any other crime including embezzlement. *See* Exhibit 2, Criminal Case Records Search Results,
 22 <https://lvjcpa.clarkcountynv.gov/Anonymous/Search.aspx?ID=100> (August 25, 2016).

23 In *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1198-1200 (9th Cir. 1988), the Ninth
 24 Circuit held when ruling on a motion to dismiss, the court may look to court records to determine
 25 the facts that are “clear as a matter of public record.” The Court reasoned that the “court may
 26 properly look beyond the complaint only to items in the record of the case or to matters of
 27 general public record” without converting a motion to dismiss into one for summary judgment.
 28 *Id.* at 1198. Here, county court records demonstrate that no embezzlement action was ever

1 commenced against Plaintiff in the Clark County Courts and therefore Plaintiff has no claim for
 2 malicious prosecution.

3 Even if Plaintiff had been prosecuted for embezzlement, Plaintiff's claims for malicious
 4 prosecution would still fail. Plaintiff does not allege any facts showing that Defendant did
 5 anything to direct, request, or pressure police officers to commence prosecution of Plaintiff for
 6 embezzlement. Instead, Plaintiff merely "believes" that Southern Nevada "filed a . . . police
 7 report alleging that the plaintiff that the plaintiff had committed embezzlement of funds . . .".
 8 *See* Complaint at 9, ¶ 39. In *Lester*, the Nevada Supreme Court held that defendant cannot "be
 9 held liable for commencing the criminal action because they merely reported information" and
 10 did not otherwise direct request or pressure the police to commence a criminal proceeding. 112
 11 Nev. at 1429, 929 P.2d at 913. In fact, Plaintiff concedes that he lacks facts showing that
 12 Southern Nevada even reported Plaintiff to the police as he only "believes" Southern Nevada
 13 "filed a police report," without alleging any facts to support such a belief. *See Bell Atlantic*
 14 *Corp. v. Twombly*, 550 U.S. 544, 551, 557 (2007) (declining to take as true a conclusory
 15 allegation based "upon information and belief" when plaintiff failed to allege sufficient facts to
 16 make that statement plausible).

17 Moreover, as already set forth, Plaintiff cannot show "malice" or a "favorable
 18 termination" when Plaintiff admits facts which would reasonably lead one to believe that
 19 Plaintiff embezzled funds and claims that he has pled "no contest" to the crime of embezzlement.
 20 *See Lester*, 112 Nev. at 1430, 929 P.2d at 913 (holding claims of malicious prosecution lacked
 21 merit when defendant had "a good faith belief" that plaintiff had committed acts amounting to
 22 theft, even though plaintiff did not actually commit the crime); *Daubenmire*, 507 F.3d at 390
 23 (holding plaintiffs "are estopped by their [no-contest] pleas in state court from now challenging
 24 the reasonableness of their arrest" and that the underlying facts were sufficient to establish
 25 probable cause that plaintiffs committed the crime); *Rosenthal*, 107 Nev. at 776, 819 P.2d at
 26 1300 (holding a "conviction may be considered even when based upon a plea of nolo
 27 contendere"). As Plaintiff has not and cannot show a single element of a claim for malicious
 28 prosecution, this Court should dismiss that claim with prejudice. *See Amon Ra v. Cochise Cty.*,

1 442 Fed. App'x 286, 287 (9th Cir. 2011) (holding Plaintiffs failed to state a claim for malicious
 2 prosecution when “[a]t most, Plaintiffs alleged that Federal Defendants provided information to
 3 state and federal prosecutors”).

4 **D. Plaintiff's Interference Claim Has NO Merit.**

5 In *J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 274, 71 P.3d 1264, 1267 (2003), the Nevada
 6 Supreme Court held that to state a valid “action for intentional interference with contractual
 7 relations, a plaintiff must establish: (1) a valid and existing contract; (2) the defendant's
 8 knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual
 9 relationship; (4) actual disruption of the contract; and (5) resulting damage. In making this
 10 showing, “plaintiff must establish that the defendant had a motive to induce ***breach of the***
 11 ***contract with the third party.***” *Id.* at 275, 71 P.3d at 1268 (emphasis added). As the breach
 12 induced must be that of a contract with a third-party, this Court, in *Crockett & Myers, Ltd. v.*
 13 *Napier, Fitzgerald & Kirby, LLP*, 440 F. Supp. 2d 1184, 1194 (D. Nev. 2006), held that “a party
 14 cannot, as a matter of law, tortiously interfere with its own contract.” *See also Bartsas Realty,*
 15 *Inc. v. Nash*, 81 Nev. 325, 327, 402 P.2d 650, 651 (1965) (rejecting claim for “tortious
 16 interference” because “defendants' breach of their own contract with the plaintiff is not a tort”).

17 Plaintiff claims that he was a truck driver for the Southern Nevada. *See* Complaint at 3, ¶
 18 10. Plaintiff's claim of interference is based on his erroneous claim “that the defendant
 19 prematurely terminated the plaintiff's employment contract. . . .” *See* Complaint at 7, ¶ 28.
 20 Plaintiff therefore does not allege interference with the contract of a third party, but interference
 21 with Southern Nevada's own contract with Plaintiff. As Plaintiff has not and cannot establish a
 22 claim of interference of contract against Southern Nevada, this Court should dismiss Plaintiff's
 23 interference claim. *See Crockett & Myers*, 440 F. Supp. 2d at 1195 (granting motion to dismiss
 24 interference claim when the complaint alleged that a party to a contract interfered with that
 25 contract).

26 **E. Plaintiff's Breach of Fiduciary Duty Claim Has NO Merit.**

27 In *Stalk v. Mushkin*, 199 P.3d 838, 843 (Nev. 2009), the Nevada Supreme Court
 28 explained that a “ breach of fiduciary duty claim seeks damages for injuries that result from the

1 tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship.” In
 2 *Klein v. Freedom Strategic Partners, LLC*, 595 F. Supp. 2d 1152, 1162 (D. Nev. 2009), this
 3 Court held that to “prevail on a breach of fiduciary duty claim, the plaintiff must establish: “(1)
 4 the existence of a fiduciary duty; (2) breach of that duty; and (3) the breach proximately caused
 5 the damages.” In *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 530 (1982), the Nevada
 6 Supreme Court held that a fiduciary duty “exists when one reposes a special confidence in
 7 another so that the latter, in equity and good conscience, is bound to act in good faith and with
 8 due regard to the interests of the one reposing the confidence.”

9 In *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 618, 621 (9th Cir. 2004), the Ninth
 10 Circuit held that “[n]o presumption of a confidential relationship arises from the bare fact that
 11 parties to a contract are employer and employee,” and therefore refused to find a fiduciary duty
 12 between and employer and employee based on the employee’s claim that the employer failed to
 13 pay overtime and that the employer misrepresented to employees that they were not entitled to
 14 overtime. As already set forth, the only relationship alleged between Plaintiff and Southern
 15 Nevada is that of employee and employer. The only breach Plaintiff claims is the failure to pay
 16 the correct amount of wages. *See* Complaint at 8, ¶ 34. Plaintiff therefore fails to establish any
 17 fiduciary duty or breach. Accordingly, this Court should dismiss Plaintiff’s claim for breach of
 18 fiduciary duty is completely without merit.

19 **F. Plaintiff’s Conversion Claim Has NO Merit.**

20 In *M.C. Multi-Family Dev., L.L.C. v. Crestdale Associates, Ltd.*, 124 Nev. 901, 910, 193
 21 P.3d 536, 542 (2008), the Nevada Supreme Court held that to establish a claim of conversion,
 22 plaintiff must show that defendant exercised “a distinct act of dominion wrongfully exerted over
 23 [plaintiffs’] personal property in denial of, or inconsistent with his title or rights therein or in
 24 derogation, exclusion, or defiance of such title or right.” The only act of conversion claimed by
 25 Plaintiff is the alleged failure to pay Plaintiff his full wages, which as a matter of law cannot
 26 support a claim for conversion. *See* Complaint, at 8, ¶ 36.

27 In *Temmen v. Kent-Brown Chevrolet Co.*, 605 P.2d 95, 99 (Kan. 1980), the Kansas
 28 Supreme Court, relying upon the same definition for conversion applied by the Nevada Supreme

1 Court, held that withholding sums from “employee's wages without written authority . . . does
 2 not constitute the tort of conversion.” The Court reasoned “an action for conversion of the funds
 3 representing the indebtedness will not lie against the debtor.” *Id.*; *see also Lockerby v. Sierra*,
 4 535 F.3d 1038, 1043 n.5 (9th Cir. 2008) (holding an “action for conversion will not lie for
 5 money that is simply a debt”). Courts have universally reached the same conclusion. *See In re*
 6 *Wal-Mart Wage & Hour Employment Practices Litig.*, 490 F. Supp. 2d 1091, 1105 (D. Nev.
 7 2007) (holding claim for unpaid wages could not support a claim of conversion because “there
 8 can be no conversion of a debt within the debtor-creditor relationship”); *Rehbein v. St. Louis Sw.*
 9 *Ry. Co.*, 740 S.W.2d 181, 183 (Mo. Ct. App. 1987) (holding that the “withholding [from wages]
 10 did not constitute conversion because if defendant owed plaintiff money, it was for work and
 11 labor already performed which gives rise to a claim for unpaid wages, a general debt”); *Owens v.*
 12 *Zippy Mart of SouthCarolina, Inc.*, 268 S.C. 383, 386, 234 S.E.2d 217, 218 (1977) (holding “a
 13 disputed claim for her wages” could not support a claim of conversion because “an action based
 14 on conversion of the funds representing the debt is improper”). Accordingly, Plaintiff’s
 15 erroneous claim that Southern Nevada failed to pay Plaintiff the appropriate wage does not
 16 amount to conversion, and Plaintiff’s claim of conversion should be dismissed with prejudice.
 17 *See Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 204 (2d Cir. 2013)
 18 (holding “dismissal of the conversion claim with prejudice” was required because a claim for
 19 failure to pay wages does not amount to conversion).

20 **G. Plaintiff’s Fraud Claim Has NO Merit.**

21 In *Chen v. Nevada State Gaming Control Bd.*, 116 Nev. 282, 284, 994 P.2d 1151, 1152
 22 (2000), the Nevada Supreme Court held that to “establish fraud [or misrepresentation], the
 23 [plaintiff] must show that [defendant] provided a false representation of a material fact, which he
 24 knew to be false; that [defendant] intended the [plaintiff] to rely on the misrepresentation; that
 25 the [plaintiff] detrimentally relied on the misrepresentation; and that the misrepresentation
 26 proximately caused damages.” In *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 558 (9th Cir.
 27 2010), the Ninth Circuit explained that Fed. R. Civ. P. “9(b) demands that the circumstances
 28 constituting the alleged fraud be specific enough to give defendants notice of the particular

1 misconduct so that they can defend against the charge and not just deny that they have done
 2 anything wrong.” The court held that to “avoid dismissal for inadequacy under Rule 9(b), the
 3 complaint would need to state the time, place, and specific content of the false representations as
 4 well as the identities of the parties to the misrepresentation.” Plaintiff fails to plead with
 5 particularity any such facts. This Court should therefore dismiss Plaintiff’s fraud claim as
 6 without merit.

7 The only allegations relied upon to support Plaintiff’s claim of fraud is his unsupported
 8 belief that Southern Nevada filed a false police report and falsely told the employment office that
 9 he quit his job. *See* Complaint at 8, ¶¶ 29, 42. As already set forth, any claim that Southern
 10 Nevada filed a false police report has no support as Plaintiff admits facts supporting a claim of
 11 embezzlement and has pleaded no contest to that charge. Additionally, Plaintiff does not allege
 12 that he was even aware of any reports made by Southern Nevada to the Police Department, let
 13 alone claim reliance on such reports.

14 Plaintiff’s allegation that Southern Nevada falsely reported that Plaintiff quit is belied by
 15 his own admissions and by the public record. In *State, Nevada Employment Sec. Dep’t v. Weber*,
 16 100 Nev. 121, 122-25, 676 P.2d 1318, 1319-20 (1984), the Nevada Supreme Court held that an
 17 employee “voluntarily left his last employment without good cause” when the record shows that
 18 he “stopped showing up for work after the employer changed the method of shift selection and
 19 respondent could no longer work during the shift he preferred.” *See also Hughen v. Highland*
 20 *Estates*, 137 Idaho 349, 351, 48 P.3d 1238, 1240 (2002) (“By not returning to work . . . when he
 21 was aware that he was scheduled to work could be interpreted as [the employee] quitting”);
 22 *Doran v. Employment Sec. Agency*, 75 Idaho 94, 97, 267 P.2d 628, 630 (1954) (holding that if
 23 any employee “leaves without attempting to secure temporary leave, or fails to take reasonable
 24 measures to keep his employer informed, and to secure agreement to his absence, he will be held
 25 to have quit voluntarily without good cause” because it “is the duty of the employee to have
 26 regard for the interests of his employer and for his own job security, and to act as a reasonably
 27 prudent person would in keeping contact with his employer and in securing the permanence of
 28 his employment”) cited with approval in *Kraft v. Nevada Employment Sec. Dep’t*, 102 Nev. 191,

1 194, 717 P.2d 583, 585 (1986). Plaintiff admits that he “did not show up to pick up his last load
 2 to be delivered by his truck.” *See* Complaint at 4, ¶ 13. Plaintiff does not claim he had any good
 3 cause for failing to show up or that he even informed Southern Nevada that he would not show
 4 up to work. Plaintiff therefore “voluntarily left his work” and is deemed to “have quit
 5 voluntarily without good cause.” Southern Nevada’s statement that Plaintiff quit is therefore true
 6 under Plaintiff’s own facts.

7 Nevada Department of Employment, Training and Rehabilitation (“DETR”) also
 8 specifically found that Plaintiff’s “separation is considered a voluntary quit.” *See* Exhibit 3,
 9 DETR Decision dated June 14, 2016; *see also Mack v. S. Bay Beer Distrib., Inc.*, 798 F.2d
 10 1279, 1282 (9th Cir.1986) (holding that a “court may take judicial notice of records and reports
 11 of administrative bodies . . . and doing so does not convert a Rule 12(b)(6) motion to one for
 12 summary judgment”) overruled on other grounds by *Astoria Fed. Sav. & Loan Ass’n v. Solimino*,
 13 501 U.S. 104, (1991). Plaintiff therefore is estopped from claiming otherwise. *See University of*
 14 *Tennessee v. Elliott*, 478 U.S. 788, 798 (1986) (holding “federal courts give preclusive effect to
 15 the factfinding of state administrative tribunals”). Accordingly, Plaintiff’s allegation that
 16 Southern Nevada falsely reported that Plaintiff quit cannot be viewed as true and this Court again
 17 should dismiss Plaintiff’s fraud claim.

18 Moreover, Southern Nevada’s reports to DETR and to the police are privileged and
 19 cannot support a tort liability. In *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 61, 657
 20 P.2d 101, 104 (1983) (emphasis added), the Nevada Supreme Court held “that the absolute
 21 privilege attached to judicial proceedings has been extended to quasi-judicial proceedings before
 22 executive officers, boards, and commissions, ***including proceedings in which the administrative***
 23 ***body is considering an employee’s claim for unemployment compensation.***” As any alleged
 24 statements made by Southern Nevada to DETR are absolutely privileged, Plaintiff’s claim for
 25 fraud based on such statements is absolutely bared. Additionally, in *Pope v. Motel 6*, 121 Nev.
 26 307, 317, 114 P.3d 277, 283–84 (2005), the Nevada Supreme Court held that “statements made
 27 to police before the initiation of criminal proceedings” are privileged unless plaintiff proves “by
 28 a preponderance of the evidence that the defendant abused the privilege by publishing the

1 defamatory communication with actual malice" which requires the plaintiff to demonstrate "that
 2 a statement is published with knowledge that it was false or with reckless disregard for its
 3 veracity." As already set forth, by pleading no contest to the crime of embezzlement and
 4 admitting facts supporting a claim of embezzlement, Plaintiff cannot possibly show that
 5 Southern Nevada acted in reckless disregard of the truth. *See Daubensmire*, 507 F.3d at 390
 6 (holding plaintiffs "are estopped by their [no-contest] pleas in state court from now challenging
 7 the reasonableness of their arrest," and that the underlying facts were sufficient to establish
 8 probable cause that plaintiffs committed the crime); *Rosenthal*, 107 Nev. at 776, 819 P.2d at
 9 1300 (holding a "conviction may be considered even when based upon a plea of nolo
 10 contendere"). As Plaintiff's fraud claim is based on privileged reports to DETR and to the
 11 police, Plaintiff's fraud claim is again barred.

12 Even if Southern Nevada's statements were not privileged, Plaintiff's fraud claim would
 13 still lack merit. In *Lubbe v. Barba*, 91 Nev. 596, 600, 540 P.2d 115, 118 (1975) (emphasis
 14 added), the Nevada Supreme Court explained that the "in cases of misrepresentation" the "false
 15 representation must have played a material and substantial part in leading the *plaintiff* to adopt
 16 his particular course; and when *he was unaware* of it at the time that he acted, or it is clear that
 17 he was ***not in any way influenced by it***, and would have done the same thing without it for other
 18 reasons, his loss is not attributed to the defendant." Plaintiff does not and cannot claim that he
 19 relied on statements allegedly made by Southern Nevada or changed his course of conduct in any
 20 way. Plaintiff had no reason to rely on statements made by Southern Nevada about Plaintiff
 21 because Plaintiff was intimately acquainted with his own misconduct. Plaintiff's claim of fraud
 22 or misrepresentation therefore has no merit and this Court should again dismiss that claim. *See*
 23 *Estate of Ko by Hill v. Sears Roebuck & Co.*, 982 F. Supp. 471, 476-77 (E.D. Mich. 1997)
 24 (dismissing misrepresentation claim where Plaintiff did not allege reliance by the party alleging
 25 that a false report had been made to police because "[r]eliance by the plaintiff is essential to a
 26 claim of misrepresentation").

27

28

H. Plaintiff's Claim of Intentional Infliction of Emotional Distress Has NO Merit.

In *Miller v. Jones*, 114 Nev. 1291, 1299–1300, 970 P.2d 571, 577 (1998), the Nevada Supreme Court held that to prevail on a claim of intentional infliction of emotional distress, “a plaintiff must show: (1) extreme and outrageous conduct on the part of the defendant; (2) intent to cause emotional distress or reckless disregard for causing emotional distress; (3) that the plaintiff actually suffered extreme or severe emotional distress; and (4) causation.” The only conduct claimed to be outrageous is Plaintiff’s erroneous allegations that Southern Nevada filed a false police report; that Southern Nevada lied to the employment insurance office; and that Southern Nevada discriminated against Plaintiff with respect to promotions and raises. *See* Complaint at 10, ¶¶ 46–48. As already set forth, statements made to DETR concerning an “employee’s claim for unemployment compensation” and statements made to the police are privileged. *See Circus Circus Hotels*, 99 Nev. at 61, 657 P.2d at 104; *Pope*, 121 Nev. at 317, 114 P.3d at 283–84. As any alleged statements made by Southern Nevada to DETR and the police are privileged, Plaintiff’s claim for emotional distress based on such statements is barred.

Even if the statements were not privileged, none of these allegations amount to extreme or outrageous conduct. In *Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 4, 953 P.2d 24, 26 (1998), the Nevada Supreme Court explained that “extreme and outrageous conduct is that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community.” In *Clark v. Twp. of Falls*, 890 F.2d 611, 624 (3d Cir. 1989), the Third Circuit held “forwarding charges to the district attorney, confirming that [Plaintiff] was being investigated, showing disparaging reports in public, changing [Plaintiff] duties and depriving him of privileges, and, possibly, limiting his speech at Board meetings . . . , while deplorable, do not constitute extreme and outrageous conduct” necessary to support a claim of intentional infliction of emotional distress. Plaintiff cannot claim that the alleged police report by Southern Nevada was outrageous when Plaintiff admits facts supporting a claim of embezzlement and has pleaded no contest to that charge.

Likewise, in *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 586 (9th Cir. 1993), the Ninth Circuit held that the “denial of unemployment benefits is a common business decision and is

1 simply not conduct ‘so outrageous in character, and so extreme in degree, as to go beyond all
 2 possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized
 3 community’’ and is therefore “insufficient as a matter of law to state a claim for emotional
 4 distress.” Any alleged statement about Plaintiff’s eligibility for employment benefits therefore
 5 are not outrageous and are insufficient to state a claim for emotional distress.

6 Also, in *Arroyo v. Volvo Grp. N. Am., LLC*, 805 F.3d 278, 288 (7th Cir. 2015), the
 7 Seventh Circuit held that even if the employer’s actions were discriminatory, that “did not rise to
 8 the level of ‘extreme and outrageous’’ conduct and accordingly Plaintiff’s “claim for intentional
 9 infliction of emotional distress therefore fails” and was without merit. The court reasoned that in
 10 “the absence of conduct calculated to coerce an employee to do something illegal, courts have
 11 generally declined to find an employer’s retaliatory conduct sufficiently extreme and outrageous
 12 as to give rise to an action for intentional infliction of emotional distress.” *Id.* Likewise in *Loyd*
 13 *v. Saint Joseph Mercy Oakland*, 766 F.3d 580, 592 (6th Cir. 2014), the Sixth Circuit held that
 14 “run-of-the-mill claims of employment discrimination (as are alleged here) do not constitute
 15 extreme and outrageous conduct sufficient to state a claim of intentional infliction of emotional
 16 distress.” At best, plaintiff alleges run-of-the-mill claims of employment discrimination, and
 17 even if true, which they are not, fail to show outrageous conduct necessary to support a claim of
 18 intentional infliction of emotional distress.

19 Moreover, Plaintiff has not alleged that he has even suffered any emotional distress,
 20 much less the severe emotion distress required to support such a claim. In *Miller*, the Nevada
 21 Supreme Court held claims of depression was insufficient to support a claim that Plaintiff
 22 suffered severe emotional distress necessary to state a claim of intentional infliction of emotional
 23 distress. 114 Nev. at 1300, 970 P.2d at 577. As Plaintiff does not even allege depression, his
 24 claim for intentional infliction of emotional distress has no merit and should be dismissed with
 25 prejudice.

26 **I. Plaintiff’s Breach of Contract Claim Has NO Merit**

27 In *Northampton Rest. Grp., Inc. v. FirstMerit Bank, N.A.*, Case No. 10-4056, 492 F.
 28 App’x 518, 521-22 (6th Cir. 2012), the Sixth Circuit held that the plaintiff had failed to “allege

1 facts sufficient to make its breach-of-contract claim plausible on its face" when the plaintiff "did
2 not attach any contracts to its complaint and did not include the language of any specific
3 contractual provisions that had been breached" by the defendant. The court found that it "is a
4 basic tenet of contract law that a party can only advance a claim of breach of written contract by
5 identifying and presenting the actual terms of the contract allegedly breached." *Id.* at 522; *see also*
6 *Williams v. Wells Fargo Bank, N.A.*, 560 F. App'x 233, 238 (5th Cir. 2014) (holding
7 plaintiff failed to state a claim for breach of contract because plaintiff failed to "identify the
8 specific provision in the contract that was breached").

9 Plaintiff does not identify any specific provisions of his contract, or even allege facts
10 showing he had a contract with Southern Nevada. In *Martin v. Sears, Roebuck & Co.*, 111 Nev.
11 923, 928, 899 P.2d 551, 554 (1995), the Nevada Supreme Court held that where plaintiff "has
12 not demonstrated that he was other than an at-will employee, a breach of contract cause of action
13 will not lie." The court reasoned that "a claim arising from breach of contract has no application
14 to at-will employment" and "because all employees in Nevada are presumptively at-will
15 employees," plaintiff must provide facts that "overcome the legal presumption of at-will
16 employment." *Id.* As Plaintiff does not even attempt to allege facts showing that he is other than
17 an employee at will, he cannot show that he has a contract with Southern Nevada, much less
18 show that Southern Nevada breached this non-existent contract. Accordingly, this Court should
19 dismiss Plaintiff's breach of contract claim.

1 **III. CONCLUSION**

2 Pursuant to the foregoing, this Court should grant Southern Nevada's motion and dismiss
3 Plaintiff's First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth counts in his
4 Complaint.

5 Dated this 29th day of August 2016

6 COHEN|JOHNSON|PARKER|EDWARDS

7 By: /s/ Chris Davis

8 H. Stan Johnson, Esq.
9 Nevada Bar No. 00265
10 Chris Davis, Esq.
11 Nevada Bar No. 06616
12 255 E. Warm Spring Road, Suite 100
13 Las Vegas, Nevada 89119
14 Attorneys for Defendant

PROOF OF SERVICE

CASE NAME: Coulson v. Southern Nevada Movers
Court: USDC Nevada
Case No.: 2:16-cv-01989

On the date last written below, following document(s) was served as follows:

MOTION TO DISMISS

X by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States Mail, Las Vegas, Nevada and addressed to:
_____ by using the State Court's CM/ECF Electronic Notification System addressed to:
_____ by electronic email addressed to :
_____ by personal or hand/delivery addressed to:
_____ By facsimile (fax) addresses to:
_____ by Federal Express/UPS or other overnight delivery addressed to:

Edward Coulson
4529 Townwall Street
Las Vegas, Nevada 89115
Plaintiff

DATED the 29th day of August 2016.

/s/ Sarah Gondek
An employee of Cohen|Johnson|Parker|Edwards

1

Exhibit 1

Exhibit 1

Civil/Criminal Case Records Search Results

Skip to Main Content Logout My Account Search Menu New District Civil/Criminal Search Refine Search Location : District Court Civil/Criminal Help

Record Count: 11

Search By: Party Party Search Mode: Name Last Name: Coulson All All Sort By: Filed Date

Case Number	Citation Number	Style/Defendant Info	Filed/Location	Type/Status	Charge(s)
97A382457		Alicia Coulson vs Stasha Boyd, Ron Boyd	12/18/1997 Department 13	Negligence - Auto Closed	
98A383764		Gladys Hawkins vs Christopher Coulson	01/27/1998 Department Unassigned	Negligence - Auto Closed	
03A466363		Gloria Lopez vs Alicia Coulson	04/17/2003 Department 12	Negligence - Auto Closed	
03A474330		James Coulson, Lillian Coulson vs Kelly Mitcham, Donna Mitcham, et al	09/30/2003 Department 24	Other Civil Filing Closed	
06A526449		Centurion Capital Corp vs James Coulson	08/14/2006 Department 12	Breach of Contract Closed	
06C225705		Coulson, Delilah	08/31/2006 Department 21	Felony/Gross Misdemeanor Closed	ATTEMPT, ACTIONS WHICH CONSTITUTE THEFT THEFT-PENALTIES
08A556575		Victoria Coulson vs Diana Anderson	02/04/2008 Department 23	Negligence - Auto Closed	
A-09-598165-B		Asset Resolution LLC, Plaintiff(s) vs. Donna Cangelosi, Defendant(s)	08/28/2009 Department 15	Business Court Closed	
A-13-691662-C		Kyle Dotson, Plaintiff(s) vs. Delilah Coulson, Defendant(s)	11/14/2013 Department 20	Negligence - Auto Closed	
C-16-313283-1		Coulson, Eldrion Montre	03/10/2016 Department 6	Felony/Gross Misdemeanor Reactivated	COMPETENCY DETERMINATION COMPETENCY DETERMINATION
A-16-740702-C		Edward Coulson, Plaintiff(s) vs. Southern Nevada Movers, Defendant(s)	07/27/2016 Department 32	Other Civil Matters Closed	

Exhibit 2

Exhibit 2

Criminal Case Records Search Results

[Skip to Main Content](#) [Logout](#) [My Account](#) [Search](#) [Menu](#) [New Criminal Search](#) [Refine Search](#)Location : Justice Court [Help](#)**Record Count: 2****Search By:** Defendant **Party Search Mode:** Name **Last Name:** coulson **First Name:** edward [All](#) [All](#) **Sort By:** Filed Date

Case Number	Citation Number	Defendant Info	Filed/Location	Type/Status	Charge(s)
15F04965X		Coulson, Edward	04/02/2015 JC Department 14	Gross Misdemeanor Closed	Battery [50212]
16M00433X		COULSON, EDDIE	01/12/2016 JC Department 12	Misdemeanor Dismissed	Dom battery, (1st) [50235]

Exhibit 3

Exhibit 3



DETR

Nevada Department of Employment,
Training and Rehabilitation

ONE NEVADA - Growing A Skilled, Diverse Workforce



3481584
<http://www.nvdestr.org>

Original

SOUTHERN NEVADA MOVERS INC
4850 STATZ ST #102 %RONGO
N LAS VEGAS, NV 89081

RE: EDWARD COULSON
SSN: 641-03-0464
Issue ID: 3197976
Week End Date: 12/19/2015
Date Mailed: 01/15/2016
Last Day to Appeal: 01/26/2016
Decision Date: 01/14/2016

* See back of form for Appeal Rights
and other important information.

*Vea el reverso de la hoja para
los derechos de apelación y otra
información importante.

The claimant received a determination stating:

DECISION

You are not entitled to benefits effective 12/06/2015 until you return to work in covered employment and earn at least \$193.00 in each of 10 weeks. (Proof of earnings must be furnished to end this disqualification period.)

REASON FOR DECISION

Your employer reported that you voluntarily quit your job. You stated that you were discharged however; during your interview, you requested that your separation statement be deleted and you discontinued the interview. Your employer has presented the more credible evidence and account of events in this instance. As such, this separation is considered a voluntary quit. No compelling reason for quitting has been shown.

As you have not established a compelling reason for quitting available work, good cause has not been shown.

Pertinent Section of Law:

NRS 612.380: A person is ineligible to receive benefits for the week in which he voluntarily left his last or next-to-last employment: 1) Without good cause, and until he returns to work in subsequent covered employment and earns his weekly benefit amount in each of ten weeks; or 2) To seek other employment until he secures other employment and is subsequently unemployed through no fault of his own.



Report suspected UI Fraud online at <https://uifraud.nvdestr.org>

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